92-2007

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THOMAS J. ROEHL, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June 11, 1993

62 pp

QUESTION PRESENTED

Can subsequently enacted state legislation transform a non-conviction into a conviction for purposes of sentence enhancement under 18 U.S.C. § 924, the Firearm Owners Protection Act, even when a felon receives a "certificate of discharge" restoring all civil rights, without express limitation on the right to bear firearms, and the state law at the time of discharge does not contain any such limitation, and as to which the Courts of Appeals are in conflict?

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No.

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

THOMAS J. ROEHL, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petitioner, Thomas J. Roehl, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Thomas J. Roehl v. United States, 977 F.2d 375 (7th Cir. 1992), and appears in Appendix A.

JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was entered on October 13, 1992. Roehl seeks this Court's review by certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 921(a)(20), 922(g), and 924(e)(1) are set out in Appendix B. Wisconsin Statutes §§ 57.078, 304.078, and 941.29 are set out in Appendix C.

STATEMENT OF THE CASE

Thomas J. Roehl ("Roehl") was tried and convicted in the United States District Court for the Eastern District of

Wisconsin on one count of possession of a firearm by a convicted felon. 18 U.S.C. § 922(g). Roehl was sentenced to fifteen (15) years imprisonment under the penalty enhancement provision of 18 U.S.C. § 924(e).

Roehl, proceeding pro se, then challenged the sentence of the district court pursuant to 28 U.S.C. § 2255. This motion was denied by the district court. Roehl, again pro se, then filed a motion for reconsideration of the denial of the § 2255 motion. This motion was also denied by the district court. Then Roehl, again pro se, appealed to the Seventh Circuit Court of Appeals for reversal of the district court. Without hearing oral arguments, the Seventh Circuit affirmed the district court's judgment in a

published decision, 977 F.2d 375 (7th Cir. 1992), on October 13, 1992.[1]

The Seventh Circuit Court of Appeals on February 4, 1993, denied Roehl's petition for reconsideration en banc. After receiving an enlargement of time in which to file a petition for a writ of certiorari, Roehl submits the present petition to the United States Supreme Court for review.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Certiorari must be granted because the Seventh Circuit Court of Appeals, along with other circuits, is failing to apply the plain meaning and legislative intent of the Firearm Owners Protection

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[1] Attorney Michael F. Hupy moved for permission to present oral agrument, pro bono on behalf of Roehl. This motion was denied.

Act ("F.O.P.A.") specifically, 18 U.S.C. § 921(a)(20). The failure to apply the plain meaning of the statute is stripping people of their civil rights, without due process, and depriving them of their liberty. The issue before this Court is whether a person who was convicted of a felony, but then has had his civil rights restored pursuant to state statute, may then have those same felony convictions counted toward an "enhanced sentence" pursuant to 18 U.S.C. § 924(e). Because of the split among the Circuits on this issue and its arbitrary application, a uniform interpretation is necessary.

I. CIRCUITS ARE WIDELY SPLIT IN INTERPRETING AND APPLYING 18 U.S.C. § 921(a)(20).

This case arises from the interpretation and application of 18 U.S.C. § 921(a)(20). A long line of

precedents requires the court to give meaning whenever possible to every word and clause when interpreting a statute. Moskal v. United States, ___ U.S. ___, 111 S. Ct. 461 (1990). Absent a clear, express legislative intent to the contrary, statutory language must be regarded as conclusive. Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980). See also, Bifulco v. United States, 447 U.S. 381 (1980).

Under 18 U.S.C. § 924(e)(1),[2] a person who is convicted under § 922(g)[3] and who has three prior convictions for a "crime punishable by imprisonment for a

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[2] 18 U.S.C. § 924(e)(1) is a penalty enhancer statute for those who have three previous convictions which, if applied, adds a minimum 15 years without parole to the sentence.

[3] 18 U.S.C. § 922(g) is the statute which makes it a crime for a felon to possess a firearm.

term exceeding one year" must be imprisoned for at least fifteen years. Title 18 U.S.C. § 921(a)(20) defines a "crime punishable by imprisonment for a term exceeding one year" in part as follows:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport,

> possess, or receive firearms. (Emphasis added).

Title 18 U.S.C. § 921(a)(20) creates two categories of prior convictions with regard to the restoration of civil rights. The first is comprised of those who are not prohibited from possessing a weapon and are thus exempt from prosecution under F.O.P.A. The second class includes those people who have not had their civil rights restored and who are, therefore, subject to prosecution under the federal firearms statutes. No third class was contemplated wherein persons who have had their civil rights restored and then subsequently restricted by state statute would be subject to prosecution under 18 U.S.C. §§ 921-928.

Title 18 U.S.C. § 921(a)(20) is clear that once a person's civil rights have

been restored under the state law, the conviction "shall not be considered a conviction for purposes of this chapter, unless. . .restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20) (Emphasis added).

The circuits have failed to properly interpret this clear legislative mandate and have split in their decisions. Among the various circuits, the courts are divided on three issues as to the proper application of 18 U.S.C. § 922. These three areas encompass (1) what do courts review to determine if there has been a restoration of civil rights; (2) what point in time is state law to be examined for purposes of determining restoration of a convicted felon's civil rights; and (3)

how do the courts decide if there has been a restoration under state law.

A. **Circuits Are Split As To What Courts Review To Determine Restoration of Civil Rights.**

There appear to be two competing viewpoints the circuit courts have taken when determining if there has been a restoration of civil rights that removes a previous conviction from being considered for sentence enhancement under F.O.P.A. The first theory holds that restoration of civil rights, as a whole or particularized, is a question to be answered by examining the whole of state law. The second theory holds that restoration of civil rights is a question to be answered by examining the document which grants the restoration.

The first theory, exemplified by United States v. Cassidy, 899 F.2d. 543

(6th Cir. 1990), examines state law to determine the status of prior convictions for sentence enhancement. The Sixth Circuit was faced with a defendant who, after serving a felony sentence, received a certificate bearing the legend "Restoration of Civil Rights." Id. at 544. Some years later, Cassidy was arrested for possessing a firearm. When the court was faced with the question of whether the right to bear arms was included in that restoration, the court interpreted U.S.C. § 921(a)(20) as a clear mandate from Congress to "look to the law of the state in which a defendant was tried" to determine the status of those past crimes for sentence enhancement. Id. at 547.

In the case at hand, Roehl v. United States, the Seventh Circuit also examined

the whole of state law to determine if civil rights had been restored. However, unlike the Sixth Circuit, rather than examining state law at the time of the most recent discharge and restoration, the court looked to the state law at the time of the conviction. In the time between the previous release and restoration, Wisconsin had enacted legislation prohibiting convicted felons from possessing firearms. Thus, the Seventh Circuit maintains this legislation acted to change the status of the prior convictions. See also, United States v. Gomez, 911 F.2d 219, 220-21 (9th Cir. 1990).

The competing viewpoint examines the language of 18 U.S.C. § 921(a)(20) which provides that:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. (Emphasis added).

The Eleventh Circuit has interpreted this to require that any civil rights not restored must be expressly noted in the document granting the restoration. In United States v. Swanson, 947 F.2d 914 (11th Cir. 1991), Swanson, in 1979, received a "Certificate Granting Restoration of Civil and Political Rights" which contained no express restriction or

limitation on his firearms privileges. Later, the State of Alabama tried to use Swanson's prior conviction for manslaughter as a predicate for sentence enhancement under 18 U.S.C. § 922(g). The Eleventh Circuit held that the state parole board's "restoration to Swanson, without express limitation, of 'all civil and political rights' means exactly what it says: It nullifies 'any and all legal incapacities,' including the right to possess firearms." Id. at 918. See also, United States v. Erwin, 723 F.Supp. 1285 (C.D.Ill. 1989), *aff'd*, 902 F.2d 510, 513 (7th Cir. 1990); United States v. Traxel, 914 F.2d 119 (8th Cir. 1990).

B. **Circuits Are Split As To What Point In Time Is State Law To Be Examined For Purposes Of Determining Restoration Of A Convicted Felon's Civil Rights.**

The majority of circuits holds that the entirety of state law must be examined. These circuits are further split over the point in time at which the state law should be examined for purposes of determining restoration of a convicted felon's civil rights. On one side are three circuits (the Fourth, Eighth, and Ninth) all of which examine the state law at the time of discharge. The Seventh Circuit stands alone on the other side. In a unique decision, Roehl, 977 F.2d 375, the Seventh Circuit examined the state law at the time of the convicted felon's last conviction.

The Fourth Circuit, in deciding a case that mirrors Roehl's case, clearly stated the proposition that a court should examine the state law at the time of a convict's discharge. In United States v.

Haynes, 961 F.2d 50 (4th Cir. 1992), a convicted felon was discharged from parole and had his civil rights restored. At the time of this discharge, there was no law in West Virginia prohibiting convicted felons from carrying firearms. Subsequently, however, the state passed such a law. The Fourth Circuit stated "when we refer to the whole of West Virginia law in effect at the time that Haynes' civil rights were restored, we find no state law limitation on the defendant's ability to carry a firearm." Id. at 53 (emphasis added).

Similarly, the Eighth Circuit has repeatedly made clear its stance on the issue: a court should look to the civil rights restored at the time of the felon's discharge. United States v. Davis, 936 F.2d 352, 357 (8th Cir. 1991), cert.

denied, ___ U.S. ___, 112 S.Ct. 1268 (1992) ("The restoration of his civil rights by Minnesota upon his discharge from that conviction in 1976 could give him only what Minnesota had the power to give.") (emphasis added). In Bell v. United States, 970 F.2d 428 (8th Cir. 1992), a panel of circuit judges explained an earlier decision by stating "two of the convictions used to enhance the defendant's sentence were convictions for which he had had his civil rights restored, and state law in effect at the time [of conviction] imposed no limitation on a convicted felon's right to possess firearms. . . ." Id. at 429 n.2 (emphasis added) (citing Traxel, 914 F.2d 119); see also, Carey v. Carlson, Criminal No. 4-89-6, Civil No. 4-93-287 (D. Minn. May 24, 1993). Thus, those convictions were not

included in determining the sentence enhancement.

Likewise, the Ninth Circuit concluded, "the courts must determine the effect of the pardon, expungement, or restoration of civil rights at the time it is granted and cannot consider whether the defendant's civil rights later were limited or expanded." United States v. Cardwell, 967 F.2d 1349, 1350-51 (9th Cir. 1992) (emphasis added). More recently, this Circuit reaffirmed this reasoning. United States v. Bell, 983 F.2d 910, 911 (9th Cir. 1993) ("To determine whether a particular civil right has been restored, the sentencing court must look to the whole of state law at the time of restoration, without regard to whether state law subsequently changed that right.").

The Seventh Circuit turned away from the three other Circuits' reasoning in Roehl's case and took the unique position of examining the present day law, i.e., the law at the time of the "offender's last conviction." When Roehl was released in 1970, there was no Wisconsin law prohibiting a felon from possessing a weapon. The law was later changed in 1981. The circuit declared that:

> Although this enactment occurred later than Roehl's conviction, the Act [of 1981] which created [Wisconsin] § 941.29 made it clear that it applied to all earlier convictions, excepting persons who received a pardon and express authority to possess a firearm under [Chapter 18 of the Federal Code]. . . . In the state's view, Roehl's 1966

> and 1974 convictions could each be a predicate for criminal liability under Wisconsin Statutes § 941.29. Accordingly, each is also a predicate for conviction under 18 U.S.C. § 922(g) and for enhancement under 18 U.S.C. § 924(e).

Roehl, 977 F.2d at 377.

Because of this unique and unprecedented perspective, the Seventh Circuit unjustly punished Roehl. Roehl was discharged from all of his previous convictions before Wisconsin enacted § 941.29. This statute made it a crime for a felon to possess a firearm in Wisconsin. The enactment of § 941.29 "does not alter the fact that § 921(a)(20) excluded the [Petitioner] from the definition of a convicted felon for purposes of § 922(g)(1)." Haynes, 961 F.2d at 52-3.

The Seventh Circuit does seem to sense its approach was unfounded and thus, makes a token assertion that Roehl did not have his rights restored at the time of his 1970 discharge. The court states "that because the 1966 conviction did not cause Roehl to lose any state created right related to possession or ownership of firearms the 'discharge' did not tell him that such a right was restored." Roehl, 977 F.2d at 378. This reasoning was based on the absence of a right to bear arms in the Wisconsin state constitution to determine the result in Roehl's case.[4] Id. However, this

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[4] Wisconsin has implicitly recognized a civil right to bear a firearm. Discharge certificates are issued to each felon in Wisconsin upon completion of one's sentence. Since 1988, under a portion of the certificate titled "RESTORATION OF CIVIL RIGHTS," the certificate reads in part: "CIVIL RIGHTS

reasoning is faulty. Prior to any conviction, Roehl was not under any disability as to possessing firearms. Obviously, while incarcerated Roehl was not allowed to have a gun. Then, upon restoration of all of Roehl's rights, the disability was removed, and Roehl's status would have been that as if he had not been convicted.

The Seventh Circuit's interpretation of § 921(a)(20) is especially shocking in light of the Fourth Circuit's decision in Haynes. See United States v. Haynes, 961 F.2d 50 (4th Cir. 1992). Roehl and Haynes are factually identical, yet Haynes' sentence was vacated while Roehl's sentence was upheld. The Fourth Circuit

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THAT ARE NOT RESTORED TO FELON: 1. FIREARMS MAY NOT BE USED OR POSSESSED UNLESS PERMISSION IS RECEIVED FROM THE UNITED STATES SECRETARY OF THE TREASURY;" (Appendix D).

did not let the absence of a right to bear arms in West Virginia's constitution determine the outcome in Haynes' case. In Haynes, the absence of a state right was not outcome-determinative. See also, Traxel, 914 F.2d 119 (the Eighth Circuit also not allowing the absence of a state right to bear arms in Minnesota's constitution to be outcome-determinative).

As is readily apparent from the preceding discussion had Roehl been in the Fourth, Eighth, or Ninth Circuits, he would not have received a fifteen year sentence without parole.

C. Circuits Are Split As To How The Restoration Of Civil Rights Is To Be Determined.

Circuits are not only split as to what and when but also how to determine if civil rights are restored. The split is two-fold: (1) must there be a full

restoration of civil rights before recognizing a felon's right to bear a firearm or only a substantial restoration; and (2) is an individualized state action required to restore a felon's civil rights?

1. Circuits are clearly split as to whether there need be a full restoration or only a substantial restoration of civil rights for a felony conviction to be a non-conviction for sentence enhancement.

The Circuits acknowledge a split as to whether there need be a full or a substantial restoration of civil rights before a conviction is treated as a non-conviction for purposes of sentence enhancement under 18 U.S.C. § 921(a)(20). The split was crystallized when two circuits interpreted the same Michigan statute.

The Sixth Circuit stated "we reject the idea apparently adopted by the Ninth Circuit in Dahms that federal law prohibits convicted felons only from carrying such weapons as the state that originally sentenced them would not allow them to carry." United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992). The Driscoll holding reflects a clear split and rejection of the Eighth Circuit, Ninth Circuit, and even an earlier decision in the Sixth Circuit[5] that Congress intended there need only be a substantial restoration of civil rights to qualify for excluding prior convictions under § 921(a)(20).

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[5] The Sixth Circuit stated "that Congress envisioned a restoration of more than a de minimis quantity of civil rights. We do not read into the statutory language, however, a requirement that there be a 'full' restoration of civil rights." Cassidy, 899 F.2d at 549.

The Eighth Circuit Court takes the stance that "Congress intended substantial, not total restoration of civil rights" to qualify for excluding prior convictions under federal statutes. Presley v. United States, 851 F.2d 1052 (8th Cir. 1988).

The Ninth Circuit Court also followed the same substantial restoration of rights theory. In United States v. Dahms, 938 F.2d 131 (9th Cir. 1991), Dahms was convicted of violating 18 U.S.C. § 922(g)(1) for committing a crime in Montana while carrying two shotguns. One of the felonies for the penalty enhancer was a conviction in Michigan. The Ninth Circuit examined Michigan law and held Dahms was not subject to the penalty enhancer because Michigan had substantially restored his civil rights.

Id. at 134. The Ninth Circuit held "to apply § 922(g)(1) and conclude that Dahms' right to possess any firearms was restricted under federal law because the state restricted his possession of a pistol would undermine the explicit deference to state law in § 921(a)(20)." Id.

As mentioned above, the Sixth Circuit rejected the Ninth Circuit's interpretation of the same Michigan statute. The Driscoll court took the firm stand "that in cases involving 18 U.S.C. § 922(g)(1), federal courts should examine state law solely for the purpose of determining whether the state has restored the felons to their full civil rights, including allowing them to possess firearms." Driscoll, 970 F.2d at 1480 (emphasis added).

2. Circuits are split as to whether there must be an individualized state action to restore civil rights.

Circuits have split as to determining if an individualized action is required by the state before a felon's civil right to bear a firearm can be restored. The First Circuit Court in United States v. Ramos, 961 F.2d 1003, 1010 (1st Cir. 1992), held that there must be an "affirmative act" by the state to restore a felon's civil rights even while recognizing that other circuits have held differently. The Seventh Circuit Court, in the case at hand, similarly held, "We think it arguable, at least, that the restoration of civil rights intended under 18 U.S.C. § 921(a)(20) must be an individualized decision, as the expungement, setting aside, or pardon, also enumerated, would

be. Noscitur a Sociis." Roehl, 977 F.2d at 378 (emphasis added).

Thus, according to the Seventh Circuit, a general state statute restoring civil rights, as Wis. Stats. § 57.078 did at the time of Roehl's discharge in 1970, would not effectively restore Roehl's civil right to bear firearms for the purposes of § 921(a)(20). The court even said, "we find no reasonable implication that one who receives such a 'Discharge' will be treated as if no longer convicted, even if the language 'any civil rights lost as a result' of the conviction can be construed to mean all 'civil rights.'" Id. at 378.

Therefore, according to the Seventh Circuit, a state granting a restoration of "all civil rights" by statute does not allow the felon to vote, hold office, or

bear a firearm. This reasoning is inconsistent with the federal statute and other circuits. In reading § 921(a)(20), one finds that the plain language of Congress does not attach any more or any less significance to the four methods of avoiding prosecution for being an ex-felon in possession of a firearm. Title 18 U.S.C. § 921(a)(20) in part states "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored, shall not be considered a conviction for purposes of this chapter." By using the connector "or" Congress expressed its intent for each method to be equally significant. Had Congress intended the restoration method to be solely recognized in the event of an "individualized

official action," they easily could have included such requirement.

The Ninth Circuit Court in United States v. Gomez, 911 F.2d 219 (9th Cir. 1990), specifically rejected this "individualized official action" theory.

> In determining that Gomez's civil rights have been restored, we decline to accept the government's suggestion that the federal statute only recognizes restoration by individual affirmative act. It is not enough, the government argues, that the state code contains provisions granting rights to discharged felons. The federal statute, however, does not impose such a requirement. . . . 'Where Congress has manifested its intention, we may not

> manufacture ambiguity in order to defeat that intent.'

Gomez, 911 F.2d at 221 (citations omitted).

As the above cases show, the lower courts are improperly interpreting the clear statutory language and are split on several issues. The circuits courts have no guidance, and are not bound by any single result. This is evidenced by the Seventh Circuit in Roehl uniquely examining a state law enacted some twelve years after discharge and believing the state must have a specific individualized action to restore civil rights of felons.

II. THE SPLIT IN THE CIRCUITS CONTINUES TO CAUSE ARBITRARY CONSTRUCTION OF THE STATUTE AND JUDICIAL LEGISLATION.

The foregoing demonstrates that if Roehl were prosecuted in another circuit, his conviction would have been reversed.

A conviction or acquittal -- imprisonment or liberty -- should not depend on the particular circuit in which a person finds oneself. Instead, the Seventh Circuit Court arbitrarily construed this statute, and Roehl is now serving a minimum 15-year sentence enhancement without eligibility of parole.

When faced with a case involving 18 U.S.C. § 921(a)(20) a circuit court can find precedent to support any interpretation it chooses. This situation allows the Circuits to make "ad hoc constitutional judgments which express merely the judge's transient feeling of what is fair, convenient, or congenial in the particular circumstances of a litigation." Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 59 (1962).

In essence, because there is no uniform interpretation of 18 U.S.C. § 921(a)(20), judges are allowed to legislate from the bench. This is a clear violation of the constitutional doctrine of the separation of powers. The Seventh Circuit, in Roehl's case, has legislated by requiring an individualized state action as well as retrospectively and arbitrarily interpreting Wisconsin law to deny Roehl the rights which were restored to him upon discharge. This Court, however, has repeatedly "reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." Morrison v. Olson, 487 U.S. 654, 693 (1988) (CHIEF JUSTICE REHNQUIST for the Court). See also, New York v. United States, ___ U.S. ___, 112 S. Ct. 2408, 2431 (1992) (JUSTICE

O'CONNOR, for the Court, stating "The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment."). "[T]he separation of governmental powers into three coordinate Branches is essential to the preservation of liberty," Mistretta v. United States, 488 U.S. 361, 380 (1989) (JUSTICE BLACKMUN for the Court), and "assure[s] the absence of despotism." Antonin SCALIA, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 881 (1983).

If this Court allows the judiciary to continue to exercise legislative powers, it sanctions a despotism that threatens liberty.

Moreover, it is a well-established principle that this Court will grant certiorari because of "a conflict among the Circuits on [the] issue of statutory construction" which produces arbitrary and capricious results. McElroy v. United States, 455 U.S. 642, 643 (1982).

In Brown Transport Corp. v. Atcon, Inc., 241 S.E.2d 15 (1977), *cert. denied,* 439 U.S. 1014 (1978), JUSTICE WHITE joined by JUSTICE BLACKMUN dissented from a denial of certiorari. JUSTICE WHITE wrote, "This conflict among jurisdictions over an issue which 'imperatively demand[s] a single uniform rule,' commands the Court's immediate attention." Id. at 1015 (quoting Cooley v. Board of Wardens, 12 How. 299, 319 (1852)).

This issue similarly demands a uniform rule.

Without any guidance from the Supreme Court and not bound to any single rule, the circuit courts have drifted into the area where judicial will not judgment controls. The intolerable nature of this situation was most eloquently expressed nearly two centuries ago. "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would be the substitution of their pleasure to that of the legislative body." The Federalist No. 78, at 399 (Alexander Hamilton)(Max Beloff, ed., 1987).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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June 11, 1993

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 91-2054 & 91-3020

THOMAS J. ROEHL,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 90 C 1128—Thomas J. Curran, *Judge.*

SUBMITTED JUNE 16, 1992*—DECIDED OCTOBER 13, 1992

Before CUDAHY and COFFEY, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

FAIRCHILD, *Senior Circuit Judge.* Thomas Roehl was convicted of possession of firearms after conviction of a

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a), Circuit Rule 34(f). Appellant has filed a statement requesting oral argument. Upon consideration of this statement, the briefs, and the record, appellant's request for oral argument is denied, and the appeal is submitted on the briefs and record.

crime punishable by imprisonment for a term exceeding one year. 18 U.S.C. § 922(g). Because he had three previous convictions of violent felonies on different occasions, he was subject to the minimum sentence of 15 years prescribed by 18 U.S.C. § 924(e), and he received that sentence. We affirmed by unpublished order. *United States v. Roehl*, No. 89-2889 (7th Cir. Nov. 5, 1990).

Roehl filed a motion pursuant to 28 U.S.C. § 2255, making a new claim. He contended that his 1966, August, 1974, and September, 1974 convictions in Wisconsin courts could not be a predicate for conviction, nor be counted for sentencing because his civil rights had been restored when he completed each sentence. He sought to excuse his failure to raise the point earlier because he had received ineffective assistance of counsel.

The district court denied relief, and Roehl appealed.

18 U.S.C. § 921 provides definitions of terms used in ch. 44, of which § 924 is also a part. Section 921(a)(20) deals with "crime punishable by imprisonment for a term exceeding one year." It provides in part,

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Roehl does not rely on any individualized official action restoring his rights, but on the operation of a general statutory provision, Wis. Stat. § 57.078:

> Every person who is convicted of crime obtains a restoration of his civil rights by serving out his term of imprisonment or otherwise satisfying his sentence. The certificate of the department or other responsi-

> ble supervising agency that a convicted person has served his sentence or otherwise satisfied the judgment against him is evidence of that fact and that he is restored to his civil rights. . . .

Roehl served the sentences and received certificates of discharge before the present offense occurred.

This court has distinguished (in construing 18 U.S.C. § 921(a)(20)) between a general restoration of rights by operation of a state statute, upon completion of a state sentence, and issuance to the convicted person of a document "implying that he is no longer 'convicted' and that *all* civil rights have been restored." *United States v. Erwin*, 902 F.2d 510, 512 (7th Cir. 1990) (Illinois conviction counted notwithstanding statute restoring civil rights on completion of sentence). Where the alleged restoration of civil rights results by operation of a state statute, the state's view whether the conviction survives is controlling. "When state law deems a person convicted, that is dispositive for federal purposes under the first sentence of § 921(a)(20)." *Id.*

We think it clear that Wisconsin does not consider a conviction to have been wiped from the record once the person convicted has satisfied his sentence. The legislative history suggests that in enacting § 57.078 the legislature was concerned with restoring the right to vote (and perhaps eligibility to public office). Brossard, Restoration of Civil Rights, 1946 Wis. L. Rev. 281. It has been held that this section does not restore the right to hold public office. *State v. Village of Lyndon Station*, 99 Wis. 2d 229, 245, 295 N.W.2d 818, 827 (Ct. App. 1980), *aff'd*, 101 Wis. 2d 472, 305 N.W.2d 89 (Wis. 1981). *See* Note, Restoration of the Civil Rights of Convicted Criminals, 1951 Wis. L. Rev. 378, 384; 1974 Wis. Op. Atty. Gen. 75. Wisconsin has no constitutional provision conferring a right to own or possess firearms. At the time of Roehl's convictions and his completion of service of his sentences, there was no Wisconsin statute making it unlawful for a convicted person to own or possess firearms. Thus his convictions

deprived him of no right in that respect, and no such right could have been "restored." In 1981, however, Wisconsin enacted Wis. Stat. § 941.29, effective March 31, 1982, making it an offense for a convicted felon to possess a gun. Although this enactment occurred later than Roehl's conviction, the Act which created § 941.29 made it clear that it applied to all earlier convictions, excepting persons who received a pardon and express authority to possess a firearm under 18 U.S.C. App. 1203, ch. 141, Laws of 1981, § 2. The fact that a previously convicted person had satisfied his sentence before possessing the firearm was not considered relevant. In the state's view, Roehl's 1966 and 1974 convictions could each be a predicate for criminal liability under Wis. Stat. § 941.29. Accordingly, each is also a predicate for conviction under 18 U.S.C. § 922(g) and for enhancement under 18 U.S.C. § 944(e).

We reject the government's argument that § 921(a)(20) was intended to control only what is a conviction of a "crime punishable by imprisonment for a term not exceeding one year" as a predicate for the offense described in § 922(g) and not to control what is a conviction for a violent felony or serious drug offense so as to be counted for sentencing under § 924(e). *See Erwin*, 902 F.2d at 511; *United States v. Traxel*, 914 F.2d 119, 122 (8th Cir. 1990); *United States v. Ziegenhagen*, 776 F. Supp. 441, 445-47 (W.D. Wis. 1991).

We also reject Roehl's argument that because Wis. Stat. § 941.29 was enacted after he satisfied his sentences and he received the benefits of Wis. Stat. § 57.078, our reliance on § 941.29 gives it *ex post facto* effect. We have no doubt that if Roehl had been prosecuted for violation of § 941.29, his earlier felony convictions could have been predicates without violation of the *ex post facto* provision. *United States v. Jordan*, 870 F.2d 1310, 1314-15 & n.1 (7th Cir. 1989). Our use of Wis. Stat. § 941.29 is only as evidence that Wisconsin views the operation of § 57.078 on a conviction as irrelevant to a prosecution for an offense as to which the prior conviction is a predicate.

Roehl makes an alternative argument why his 1966 conviction cannot be counted as one of the three required for enhancement. As provided in Wis. Stat. § 57.078, the authorities issue a certificate to a person who has satisfied his sentence. It is entitled "Discharge," recites the fact of conviction, states that the person has met the conditions of his sentence, and says that he is discharged. Roehl has not produced the "Discharge" issued when he completed the sentence on his 1966 conviction in 1970. The official records which might show that he received a particular form have been destroyed because of lapse of time. He has, however, produced a letter from a corrections official forwarding "a sample of the discharge certificate form (DOC-48A) that was being issued at the time of your 04/21/70 release."

The last paragraph of the form reads: "Any civil rights lost as result of conviction herein described, are restored by virtue of this discharge, under the provisions of section 57.078 of the Statutes of the State of Wisconsin." This language was not included in the "Discharge" pertaining to Roehl's 1974 convictions.

Roehl contends that the 1970 form of "Discharge" fulfills the *dictum* in *Erwin* that "If the state sends the felon a piece of paper implying that he is no longer 'convicted' and that *all* civil rights have been restored," § 921(a)(20) prevents counting the conviction unless the paper expressly provides that the person may not ship, transport, possess, or receive firearms.

Erwin aside, we think it arguable, at least, that the restoration of civil rights intended under 18 U.S.C. § 921(a)(20) must be an individualized decision, as the expungement, setting aside, or pardon, also enumerated, would be. *Noscitur a sociis.*

In any event, the 1970 "Discharge" form was routinely issued upon satisfaction of sentence. It referred to Wis. Stat. § 57.078 which, although using general language, has been construed to deal primarily with the right to vote, and not to restore the right to hold office. Applying the

Erwin language, we find no reasonable implication that one who receives such a "Discharge" will be treated as if no longer convicted, even if the language "any civil rights lost as a result" of the conviction can be construed to mean "all civil rights."[1] We note also that because the 1966 conviction did not cause Roehl to lose any state-created right related to possession or ownership of firearms, the "Discharge" did not tell him that such a right was restored.

We conclude that even if Roehl received this form of "Discharge," it was not a restoration of civil rights under § 921(a)(20) and did not prevent counting his 1966 conviction toward enhancement.

There is nothing to show that Roehl relied upon the 1970 "Discharge" as reducing the penalty if caught in possession of firearms. *Cf. Ziegenhagen*, 776 F. Supp. at 450.

Roehl's present claims that § 921(a)(20) prevented using his conviction under § 922(g) or for enhancement under § 924(e) were waived by failure to raise them in the trial proceeding and on appeal unless he can establish that the failure was constitutionally deficient performance by his counsel and that if the claim had been raised, the result would probably have been different. *United States v. Frady*, 456 U.S. 152, 168 (1982), *Murray v. Carrier*, 477 U.S. 478, 483, 488-89 (1986), and *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). As often happens, the question of the merits of a claim not raised and of prejudice resulting from counsel's failure to raise it tend to merge. By deciding that Roehl's claims had no merit, we have decided that he was not prejudiced by his counsel's failure to raise them.

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[1] Roehl was not, in fact, misled by any alleged restoration of his civil rights. Indeed, at trial, he testified that he knew clearly that he could not carry a gun. "[I] am a felon, and I know what the penalty is for possession of a gun, so I stay away from the gun." Tr. at 370.

A final matter. Roehl's appeal from the denial of § 2255 relief is No. 91-2054. He also appealed from an order denying reconsideration of orders granting the government's motions to include material in the record on appeal. This appeal is No. 91-3020. Treating the latter as a motion in this court under Fed. R. App. P. 10(e), Cir. R. 10, we are not persuaded that material was improperly included in the record, and we DISMISS No. 91-3020 and deny the motion. We AFFIRM the judgment appealed from in No. 91-2054.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—10-13-92

APPENDIX B

18 U.S.C. § 921(a)(20):

(a) As used in this chapter

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include -

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the laws of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for

purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 922(g):

> (g) It shall be unlawful for any person -
>
> (1) who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year; . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(1):

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than

fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

APPENDIX C

§ 57.078, Wis. Stats. (1971):

Civil rights restored to convicted persons satisfying sentence. Every person who is convicted of crime obtains a restoration of his civil rights by serving out his term of imprisonment or otherwise satisfying his sentence. The certificate of the department or other responsible supervising agency that a convicted person has served his sentence or otherwise satisfied the judgment against him is evidence of that fact and that he is restored to his civil rights. Persons who served out their terms of imprisonment or otherwise satisfied their sentences prior to August 14, 1947, are likewise restored to their civil rights from and after September 25, 1959.

§ 304.078, Wis. Stats. (1992):

Civil rights restored to convicted persons satisfying sentence. Every person who is convicted of a crime obtains a restoration of his or her civil rights by serving out his or her term of imprisonment or otherwise satisfying his or her sentence. The certificate of the department or other responsible supervising agency that a convicted person has served his or her sentence or otherwise satisfied the judgment against him or her is evidence of that fact and

that the person is restored to his or her civil rights. The department or other agency shall list in the person's certificate rights which have been restored and which have not been restored. Persons who served out their terms of imprisonment or otherwise satisfied their sentences prior to August 14, 1947, are likewise restored to their civil rights from and after September 25, 1959.

§ 941.29, Wis. Stats. (1992):

Possession of a firearm. (1) A person is subject to the requirements and penalties of this section of he or she has been:

(a) Convicted of a felony in this state.

(b) Convicted of a crime elsewhere that would be a felony if committed in this state.

(c) Found not guilty of a felony in this state by reason of mental disease or defect.

(d) Found not guilty of or not responsible for a crime elsewhere that would be a felony in this state by reason of insanity or mental disease, defect or illness.

(2) Any person specified in sub. (1) who, subsequent to the conviction for the felony or other crime, as specified in sub. (1), or subsequent to the finding of not guilty or not responsible by reason of insanity or mental disease, defect or illness, possesses a firearm is guilty of a Class E felony.

(3) Any firearm involved in an offense under sub. (2) is subject to s. 968.20(3).

(4) A person is concerned with the commission of a crime, as specified in s. 939.05(2)(b), in violation of this section if he or she knowingly furnishes a person with a firearm in violation of sub. (2).

(5) This section does not apply to any person specified in sub. (1) who:

(a) Has received a pardon with respect to the crime or felony specified in sub. (1) and has been expressly authorized to possess a firearm under 18 USC app. 1203; or

(b) Has obtained relief from disabilities under 18 USC 925(c).

(6) The prohibition against firearm possession under this section does not apply to any correctional officer employed before May 18, 1982, who is required to possess a firearm as a condition of

employment. This exemption applies if the officer is eligible to possess a firearm under any federal and applies while the officer is acting in an official capacity.

(7) This section does not apply to any person who has been found not guilty or not responsible by reason of insanity or mental disease, defect or illness if a court subsequently determines both of the following:

(a) The person is no longer insane or no longer has a mental disease, defect or illness.

(b) The person is not likely to act in a manner dangerous to public safety.

1d

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS

DISCHARGE

TO WHOM IT MAY CONCERN:

IT APPEARING TO THE DEPARTMENT OF HEALTH & SOCIAL SERVICES THAT

_____

WAS _____

AND, THE DEPARTMENT HAVING DETERMINED THAT THE ABOVE NAMED HAS SATISFIED SAID SENTENCE/PROBATION.

IT IS ORDERED THAT EFFECTIVE _____

_____

IS DISCHARGED ABSOLUTELY.

CIVIL RIGHTS INFORMATION STATED BELOW IS NOT FOR MISDEMEANOR.

RESTORATION OF CIVIL RIGHTS:

THIS CERTIFIES THAT THE FOLLOWING CIVIL RIGHTS ARE RESTORED TO FELON:

1. THE RIGHT TO VOTE;
2. THE OBLIGATION FOR JURY DUTY.

CIVIL RIGHTS THAT ARE NOT RESTORED TO FELON:

1. FIREARMS MAY NOT BE USED OR POSSESSED UNLESS PERMISSION IS RECEIVED FROM THE UNITED STATES SECRETARY OF THE TREASURY;
2. PUBLIC OFFICE CAN NOT BE HELD UNLESS A PARDON IS OBTAINED FROM THE GOVERNOR.

_____ _____

DATE SIGNED

SECRETARY
DEPARTMENT OF CORRECTION

DOC-48A (REV. 12/89)

WIS STATUTES SECTIONS 57.078 & 973